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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 09-905

	Opinion Delivered FEBRUARY 24, 2010
CEDRICK L. MHOON APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIRST DIVISION, [NO. CR 2008-1789]
V.	HONORABLE MARION A. HUMPHREY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Cedrick Mhoon was convicted by a jury in Pulaski County Circuit Court for the first-degree murder of Christopher Terry, who was killed by a single gunshot wound to the back of his head as he sat in the driver's seat of his car.[1] Appellant was also charged with aggravated robbery, because Terry's pockets were emptied of cash and his cell phone, but the jury acquitted him of that charge. Because appellant was a habitual offender, the range of sentencing was raised. Appellant was sentenced to forty years in prison for the murder. Appellant's sentence was enhanced by ten years because the jury determined that appellant or an accomplice committed the murder while employing a firearm in the

[1]Appellant was charged with capital murder, but the jury found him guilty of the lesser-included offense of first-degree murder.

commission of that crime. On appeal, appellant challenges only the enhancement, asserting that because his brother Andra Bates actually shot the victim, his murder conviction could not be enhanced. We disagree and affirm.

The relevant law is set forth in Ark. Code Ann. § 16-90-120, which provides in subsection (a):

> Any person convicted of any offense which is classified by the laws of this state as a felony who employed any firearm of any character as a means of committing or escaping from the felony, in the discretion of the sentencing court, may be subjected to an additional period of confinement in the state penitentiary for a period not to exceed fifteen (15) years.

Appellant asserted, among his motions for directed verdict, that the State had failed to present sufficient evidence that he employed a firearm as a means of committing murder. The trial judge denied that motion. The jury found appellant guilty of first-degree murder. This required the jury to decide another question, which was whether the State had proved beyond a reasonable doubt that appellant or an accomplice employed a firearm to commit the murder. The jury answered "yes."

Appellant argues that this is error because, while there was evidence that he possessed a weapon, the conclusive proof was that his brother, not he, fired the deadly shot that killed Terry. He asserts that his accomplice liability for murder would not apply to the enhancement.

We must examine the evidence before applying the law. An apartment resident called 911 on the night in question after hearing a shot, yelling, and seeing a gold-colored car drive away. Police found Terry dead in the driver's seat of his car, with his pants pockets turned inside out.

Appellant concedes that the State presented substantial evidence that he was present with his brother Andra Bates in Terry's automobile parked at the apartment complex that night. In a voluntary statement to police, appellant said he was in the front passenger seat and that Bates drove up in another vehicle and entered the back passenger seat area, purportedly to sell Terry some marijuana. Appellant possessed a .38-caliber weapon, but a different weapon (a .45-caliber weapon) was the one that expelled the deadly shot into the back of Terry's head. That weapon was later determined to belong to Franchez Shell, the boyfriend of the brothers' sister.

Shell testified that both appellant and Bates came to his house earlier on the day of the murder asking to use his gun. Shell declined, but apparently they took it without his permission. Ballistics testing later proved that this was the gun that fired the fatal shot.

In part of appellant's voluntary statement, he told the police they would find the cell phone in a trash can outside Shell's residence, and that he and Bates left Shell's gun wrapped in a bandana outside Shell's house. Appellant admitted to being aware of Bates's plan to rob Terry because the brothers were dissatisfied with being sold counterfeit cocaine by Terry,

although later he said he did not believe Bates was serious. Appellant explained that he rode around town with Terry; they were getting high together. Terry and appellant were to meet Bates at the apartment lot for the marijuana sale. After Bates entered Terry's back seat and shot him in the head, the two brothers fled the scene in the gold-colored car. However, Terry's pockets were emptied of about $800 in cash, an identification card, and a cell phone. Appellant said that Bates took those things. As they fled, appellant said he threw his gun in the Maumelle River. Appellant expressed shock that his brother shot Terry and did not want to be pinned with his brother's crime.

In appellant's brief, he asserts that the statutory enhancement requires that *he* be the person using the firearm to commit the murder. However, the jury was instructed, without objection, that it was to decide if *appellant or an accomplice* employed a firearm to commit the murder. The jury could properly so find. Moreover, the enhancement statute has been interpreted to allow accomplice liability for the underlying offense, that was committed by use of a firearm, to be sufficient for the statutory enhancement to apply. *Gammel v. State*, 259 Ark. 96, 531 S.W.2d 474 (1976). Although *Gammel* involved an earlier version of our present accomplice liability statute, *see* Ark. Stat. Ann. 41-118, 119 (Repl. 1964), the supreme court adopted the reasoning that an accomplice can be subjected to enhancement, even if the accomplice did not personally employ the firearm. *See also Maxwell v. State*, 373 Ark. 553, 285 S.W.3d 195 (2008) (in dicta). Appellant is not deemed an accomplice to the

enhancement; he is an accomplice to the underlying felony that allows consideration of the enhancement.

Although the State offers an alternative basis to consider affirming the trial court, we do not address those contentions because they are moot.

We affirm.

GLOVER AND MARSHALL, JJ., agree.